Filed Oct. 15, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 255.

CITY OF COVINGTON, ET AL., APPELLANTS,

vs.

FIRST NATIONAL BANK OF COVINGTON, KY., APPELLEE.

BRIEF FOR APPELLANTS.

P. J. HANLON, City Solicitor,
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Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 225.

THE CITY OF COVINGTON, ET AL., APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, APPELLEE.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

There are two questions involved in the merits of this case—1st, that as to the constitutionality of a certain act of the Kentucky Legislature, approved March 21, 1900, and entitled "An act relating to the taxation of the shares of stock in national banks." 2nd, that as to a certain plea of estoppel by *res judicata*.

Said questions arose and are now presented to this Court as follows:

In 1892, the Kentucky Legislature adopted an act, entitled "An act relating to revenue and taxation," article three (3) of which related to the assessment and taxation of corporate franchises. (See Acts 1891–'92–'93, page 277, which is incorporated in Kentucky Statutes as chapter 108.)

This said act of 1892, by its express terms, applies to both State and national banks.

In 1899, in Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., this Court held that said article three (3), relating to the taxation of corporate franchises, was void in so far as it proposed the taxation of the franchises of national banks.

At the next succeeding Legislature thereafter, on March 21, 1900, the Kentucky Legislature, in view of said decision by this court, adopted the act now in controversy.

For convenience of the Court, we insert in this brief a copy of said entire act, which is as follows:

CHAPTER 23.

AN ACT relating to the taxation of the shares of stock of national banks.

Whereas, The Supreme Court of the United States has lately decided that article three (3), chapter one hundred and three (103) of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Taxing shares of national bank stock.

§ 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

Manner of listing.

§ 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

When shares have not been listed since revenue law of 1892.

§ 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; Provided, That where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of

Where franchise tax has been paid.

this section as to said year or years. And provided further, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

Where paid under Hewitt bill.

§ 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

Assessments entered and reported as real estate is entered and reported

§ 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

Assessments: how enforced.

§ 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

Purpose of act.

§ 7. Whereas, It is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage.

Emergency clause.

Approved March 21, 1900.

On July 23, 1900 (four months after the adoption of said act), this suit was instituted by the First National Bank of Covington in the United States Circuit Court for the District of Kentucky, asking an injunction against the city of Covington and city officers' proceeding to collect city taxes under said act.

The grounds relied on by complainant Bank were and are: 1st, that the said act of March 21, 1900, is unconstitutional and void; 2nd, that in 1895, in a suit to which said bank and city were parties, the Court of Appeals of Kentucky adjudged that what is known as the Hewitt Bill constituted an irrevocable contract between said bank and the State, by which judgment said city and officers are now estopped from proceeding to collect city taxes under the said act.

The case having been heard, the court below (Hon. Walter Evans being judge thereof), granted and perpetuated the injunction prayed for as to taxes for any time prior to March 21, 1900, (date of adoption of said act), but refused the injunction as to taxes for any time subsequent to said date. The judgment of the court below, therefore, in effect, overruled the plea of estoppel by reason of the said adjudication in 1895, and sustained the said act of March 21, 1900, except as to the retrospective feature thereof. To that judgment the appellants excepted and prayed an appeal to this court.

SPECIFICATION OF ERRORS.

1st. The court erred in overruling defendants' plea to the jurisdiction of the court.

2nd. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient, and in overruling the demurrer thereto.

3rd. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes, either from the complainant bank or from any of the holders of shares of stock therein for any time subsequent to that date.

4th. The court erred in retaining control of this cause for any purpose.

5th. The court erred in decreeing costs herein against defendant.

6th. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint.

BRIEF OF ARGUMENT.

I.

Retroactive Legislation.

Is the Act in controversy unconstitutional by reason of the retrospective feature thereof?

In view of Mercantile National Bank vs. New York, 121 U. S., and other cases of like import, the Legislature of 1892 thought that national banks could be lawfully taxed as provided in article 3, chapter 108, Kentucky Statutes. The Legislature continued

under that impression until decision by Supreme Court in 1899. (Owensboro National Bank vs. City of Owensboro, 173 U. S.)

The Legislature of 1900, having discovered its error in that regard, undertook to conform the Revenue Laws of the State to said decision, and also to prevent, as far as practicable, any unjust or injurious consequences from said misunderstanding on part of the Legislature. To that end, the act in controversy was adopted; which has (substantially) the same effect that an act adopted in 1892 subjecting national bank shares would have had. In other words, the Legislature of 1900 did substantially what it could have done and should have done by legislative enactment in 1892.

The *ad valorem* levies, State and local, were imposed each year since 1892. Same have been paid by State banks and other taxpayers generally. National banks and the shareholders therein have received their share of the benefits of said levies.

The retroactive feature of said act is not inhibited by either the State or Federal Constitution. It does not impair the obligation of any contract. It does not take private property for public use without just compensation previously rendered. It only requires the owners of national bank shares to pay a just compensation for the benefits they have received under and in consequence of said *ad valorem* levies. It only provides a remedy for correction of a wrong and enforcement of a right. When the *ad valorem* levies of each year were imposed, the right of the State and localities to taxes thereunder upon national bank shares arose. As lately declared by Kentucky Court of Appeals: "When the tax levy is made, the liability (for taxes) accrues. For such liability a lien existed on his property." (Board of Councilmen vs. Mason & Foard Co., 100 Ky., 48; Blackwell on Tax Titles, 5th Ed. (1889), sections 324 and 327; Ky. Statutes, sections 3176 and 3375.)

The Hewitt Law having been repealed prior to 1893, and the Revenue Act of 1892 being void, in so far as it proposed taxation of the franchises and property of national banks, the shares in national banks were left, in 1893, subject to taxation for State and local purposes, under the Constitution and revenue laws of Kentucky, precisely as if neither said Hewitt Law nor Act of 1892 had ever been enacted. (Constitution Kentucky, sections 170, 171, 172 and 174; Kentucky Statutes, sections 4020, 4022, and the charters of first, second, third, fourth, fifth and sixth class cities, incorporated in Kentucky Statutes; Scobee, Sheriff, vs. Beam, &c., 22 Ky. Law Rep., 1076.)

Section 5219, Revised Statutes U. S., requires that national bank shares belonging to non-residents of the State shall be taxed where the bank is located, and not elsewhere. As to shares belonging to persons who reside within the city or town where bank is located, of course the *situs* for taxation thereof is "where the bank is located." The shares in all State banks and other institutions of loan or discount, and in all corporations embraced by article 3, chapter 108, Kentucky Statutes, are indirectly taxed where the corporation is located, the taxation being (nominally) upon the property and franchise of the corporation. National bank shares are only an interest in the property and business operations of such banks, and ought to be taxed where the corporate property and business are situated and conducted; that is, where the bank is located, and not elsewhere.

Section 171, Kentucky Constitution, provides: "They (taxes) shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." These constitutional and statutory provisions fix the *situs* of all national bank shares for purposes of taxation "where the bank is located, and not elsewhere." Otherwise, taxation of same could not he uniform nor equal. The Constitution of Kentucky does not contemplate that some of the shares in a national bank may be taxed where the bank is located, and other shares in the same bank taxed elsewhere. Such would conflict with the principle of uniformity and equality in taxation expressly incorporated in the present Constitution of Kentucky. (Maltby vs. R. & Col. Ry. Co., 52 Pa. St., 140, and authorities there cited.)

In some States the corporate property of corporations, and also the shares of stock therein, may be taxed, the shares of stock being considered as, in themselves, a property distinct from the corporate property. Where that is the rule, the common law *situs* for taxation of the shares of stock is where the owners thereof reside. That, however, is not the rule in Kentucky. In this State, if the shares of stock be taxed, the corporate property is exempted, and *vice versa*, one being considered as a representative of the other. Where this is the rule, the common law *situs* for taxation of the shares of stock is where the corporation is located and its business conducted.

Besides, no legislative purpose could be made more manifest than that of the Kentucky Legislature in adopting the revenue system of 1892, that the *situs* for taxation of corporate property and the shares therein, should be at the domicile of the corporation. The mere fact that the taxation was nominally upon the

corporate property and franchises does not affect said legislative purpose. The burden of taxation was, none the less, really upon the shareholders, wherever they might reside. This purpose, as to *situs*, applied no less to national bank shares than to shares or interests in other corporations. The underlying principle was, that the burden of taxation should be imposed where the corporation was located. The Supreme Court, in Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., did not hold said Revenue Act of 1892, void, in so far as it fixed the *situs* for taxation, but only in so far as it required the taxation of the corporate property and franchises of national banks. With respect to the proper *situs* for taxation, said Revenue Act of 1892 is unaffected by said decision, and is now in force as to national banks and all other corporations.

Hence, independently of the Act of 1900 in controversy, national bank shares were subject to taxation in 1893 and each year since then, both for State and local purposes, "where the bank was located and not elsewhere." If there were a doubt or question as to the place at which certain of said shares should be assessed, such doubt or question were only an additional reason for adoption of the Act in controversy. (Marion County vs. L. & N. R. R. Co., 91 Ky., 388.)

The Act of 1900, in obedience to Supreme Court mandate, simply transfers the burden of taxation from the corporate property and franchises to the shares of stock, leaving the *situs* for taxation as fixed by section 5219, Revised Statutes U. S., and Revenue Laws of Kentucky—that is, "at the place where the bank is located and not elsewhere."

In so far as said Act of 1900 relates to the subjection of national bank shares to taxation, or to the *situs* for taxation, it is only declaratory of the pre-existing law. Requirement that the bank shall list the shares and pay taxes, relates only to the "mode of collection," and "is only a reasonable requirement." (First National Bank vs. Commonwealth, 9 Wallace, 353.)

The subject of retroactive legislation is very ably discussed and correctly adjudicated in the case of Butler vs. The City of Toledo, 5 Ohio St., 225. An excellent collation of authorities on the subject will be found in the report of said case. The controlling principle on the subject, as declared in said Ohio case and also in Cooley & Desty on Taxation, is: "Retrospective laws, which violate no principle of natural justice, but are in furtherance of equity and good morals, are not forbidden by the Consti-

tution." See also, Marion County vs. L. & N. R. R. Co., 91 Ky., 388, and authorities therein cited.

In Kentucky, statutory provision is made for the retrospective assessment of all property. (Kentucky Statutes, sections 4090 and 4241; Louisville and Jeffersonville Ferry Company vs. Commonwealth, 22 Ky. L. Rep., 446.)

II.

Discrimination.

Is the Act in controversy unconstitutional by reason of conflict with section 5219, Revised Statutes U. S.?

The *ad valorem* levies, State and local, imposed upon the shares of stock in national banks by the act in controversy (in connection with other laws of Kentucky) are the same as the *ad valorem* levies, State and local, imposed by the laws of Kentucky upon "other monied capital in the hands of individual citizens." (2) No part of the "monied capital in the hands of individual citizens," in Kentucky, is exempted from taxation, either State or local. The same amount of taxes, State and local, required by the act in controversy to be collected upon each $100.00 in value of the shares of stock in national banks is required by the laws of Kentucky to be collected upon each $100.00 in value of all the "monied capital in the hands of individual citizens" in Kentucky. (3) The act in controversy requires the shares of stock in national banks to be assessed for taxation in the same manner that all "monied capital in the hands of individual citizens," in Kentucky, is required to be assessed for taxation, except such monied capital in the hands of individuals as is invested in State banks and other institutions of loan or discount, which is assessed as provided in article 3, chapter 108, Kentucky Statutes. (4) No assessing officer of Kentucky has assessed, or proposes to assess, for taxation, any share of national bank stock unfairly or in any manner otherwise than as required by the laws of Kentucky, and section 5219, Revised Statutes U. S. (Constitution Kentucky, sections 170, 171, 172 and 174; Kentucky Statutes, sections 4020, 4022 and article 3, chapter 108.) Neither of the said four propositions will be controverted. Therefore, the defendants contend and believe that the "taxation" of shares in national banks, required by the act in controversy, or proposed by any assessing officer, is not "at a greater rate than is assessed upon other monied capital in the hands of individual citizens."

It will be kept in mind that the restriction placed by section 5219, Revised Statutes U. S., upon taxation of national bank shares by State authority, is, "that the taxation shall not be at a greater rate than is assessed upon other monied capital *in the hands of individual citizens.*"

Congress, being aware that every State is always careful to guard the interests of her *individual citizens*, very properly selected the taxation of "individual citizens" as the standard by which to test the validity of taxation, imposed by State authority, upon national bank shares, knowing that, so long as that restriction be not violated, there could be no danger of any substantial discrimination against national bank shares (in the taxation thereof by State authority).

The *ad valorem* levies, both State and local, upon national bank shares, being the same as those upon "other monied capital in the hands of individual citizens;" no part of the "monied capital in the hands of individual citizens" in Kentucky being exempt from taxation; said shares being assessed for taxation as "monied capital in the hands of individual citizens" is assessed, except as before stated; and there being no discrimination against national bank shares by any assessing officer, it follows: That the "taxation" of national bank shares in Kentucky is not "at a greater rate than is assessed upon other monied capital in the hands of individual citizens," *unless* a discrimination exists by reason of the mode of assessment of that portion of "monied capital in the hands of individual citizens," which is invested in State banks and other institutions of loan or discount. As to "monied capital in the hands of individual citizens" *not thus invested*, the rate of taxation is necessarily the same as that upon national bank shases—the *ad valorem* levies being the same and the mode of assessment being the same as to both.

Does the mode of assessment of "monied capital in the hands of individual citizens" invested in State banks and institutions of loan or discount discriminate against national bank shares? If it does, it also discriminates against "monied capital in the hands of individual citizens" not thus invested, and against all real estate and tangible personal property belonging to citizens of Kentucky.

Why would the Legislature of Kentucky discriminate in favor of "monied capital in the hands of individual citizens" that is invested in State banks and institutions of loan or discount against "monied capital in the hands of individual citizens" not

so invested, and against all real estate and all tangible personal property belonging to citizens of Kentucky?

The proposition that article 3, chapter 108, Kentucky Statutes, discriminates in favor of the property embraced thereby, has never been advanced. On the contrary, the evident purpose thereof was to prevent monied capital invested in corporations from escaping any part of the burden of taxation. Said article is well adapted to its purpose, and its practical operation has proven its efficiency in securing the assessment and just taxation of all forms of corporate property, including corporate franchises.

By said article, all tangible property of the corporation is left to be assessed and taxed as that of natural persons, and the nominal "franchise" is made to include all intangible property of the corporation as well as its franchise proper. The value of the "franchise" (including all intangible property) is ascertained by first estimating the total value of the capital stock, and then deducting therefrom the assessed value of all the tangible property. This mode of assessment insures the assessment and taxation of not only the "franchise" proper, but also all the tangible and intangible property of the corporation, including all money, checks, notes, bonds, stocks, bills of exchange, accounts and choses in action.

In Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., 662-664, the bank vigorously contended that said article (art. 3, chap. 108, Ky. Stats.) imposed a greater burden of taxation upon monied capital invested in banks than was imposed by the laws of Kentucky upon "other monied capital in the hands of individual citizens," and was for that reason in conflict with both section 5219, Revised Statutes, and the State Constitution. Now, herein, the complainant Bank's contention is directly the reverse. In that case the Supreme Court did not decide whether or not said contention was well founded in either particular, but placed its decision upon the ground that the State could not tax the franchises or property of national banks at *any rate*.

If said contention on part of the Bank in that case was well founded, the complainant's contention herein is unfounded; because, if said article then imposed a greater burden of taxation upon the property of corporations embraced thereby than was imposed by the laws of Kentucky upon the property of individual citizens, a less burden is now imposed upon national bank shares than is imposed upon State banks.

If said article 3 discriminated, substantially, either in favor

of or against the individual citizen, the same would be in conflict with the State Constitution, and, *pro tanto* void. But the Kentucky Court of Appeals has held that there is no such discrimination in said article, and that the same is constitutional, in so far as the principle of equality in taxation is concerned. (Paducah Street Ry. Co. vs. The County of McCracken, 20 Ky. Law Rep., 1294.)

There being no discrimination by said article in favor of the property embraced thereby or against other property, it follows that the same does not discriminate against national bank shares, they being taxed as other property generally. Hence, the shares of stock in national banks, in Kentucky, are not taxed at "a greater rate" than "is assessed upon other monied capital in the hands of individual citizens." There is, therefore, no conflict between the Revenue Laws of Kentucky, as amended by the act in controversy, and section 5219, Revised Statutes U. S.

See unbroken line of Supreme Court decisions, from Adams vs. Nashville, 95 U. S., 19-22, to First National Bank of Aberdeen vs. County of Chehalis, 166 U. S., 439-441.

III.

Scobee, Sheriff, vs. Bean, &c., decided by Kentucky Court of Appeals on December 14, 1900.

The opinion in above styled case was concurred in by all the members of the Court, the whole Court sitting. Said opinion is decisive of this case. It holds that the shares of stock in national banks in Kentucky were subject to taxation for State and local purposes from 1892 to 1900. This takes away the only semblance of foundation there ever was for the contention that the Act of 1900 was unconstitutional in so far as it applies to past years.

It follows, necessarily, from said opinion, that the retroactive provisions of the Act of 1900 is not an attempt on part of the Legislature to impose taxes for past years upon property which was, during those years, not subject to taxation, but said provisions are simply for the assessment and taxation of property which was, prior to said Act, *subject to taxation* both for State and local purposes. Said Act is, therefore, *curative* in its nature, and as to past years, only provides for the assessment and collection of taxes on property theretofore *subject* to the same, but which had escaped taxation on account of a misunderstanding on part of the Legislature of 1892, and the resulting confusion in the

statute law of Kentucky relative to the taxation of national bank shares.

Said opinion also holds that article 3, chapter 108, of Kentucky Statutes, does not discriminate in favor of the corporations embraced thereby against national bank shares, and that the Revenue Statutes of Kentucky do not conflict with section 5219, Revised Statutes U. S.

Said opinion does not controvert the conceded proposition that, under any system of State taxation, revenue officers may, by mal-administration thereof, discriminate against national bank shares. But if that in any case be true, the same must be made to appear as any other fact—by pleading and proof. There is no complaint of any such action on the part of officers in this case. (22 Ky. L. Rep., 1076.)

IV.

Burden of Proof—Doubt in Mind of the Court.

In Sinking Fund Cases, 99 U. S., 700, Chief Justice Waite said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt." And in Powell vs. Pennsylvania, 127 U. S., 684, Justice Harlan reiterated the same with approval.

Said principle is now unalterably established, and is uniformly acted upon by the courts, both State and Federal.

AS TO THE PLEA OF ESTOPPEL HEREIN.

1st. Since the adjudication in 1895 (upon which complainant solely relies) the same has been overruled by the Kentucky Court of Appeals (Bank Tax Cases, 39 S. W. Rep., 1030) and also by this Court in Citizens Savings Bank of Owensboro vs. City of Owensboro, 173 U. S. Besides, since said adjudication, shares of stock in national banks of Kentucky have been expressly subjected to State and local taxation by legislative enactment. (Acts 1900, page 65.) Hence the question of the liability of complainant to the taxes in controversy is a different question from that involved in the said former adjudication. (City of Newport vs. Masonic Temple Association, 20 Ky. L. Rep., 266.)

Whether or not article 2 of the Hewitt bill constituted an irrevocable contract, was a question of law, not of fact. Hence, as said by Justice Bradley, in South Ottowa vs. Perkins, 94 U. S., page 267, "The doctrine of estoppel is totally inadmissible in the case."

2nd. The former adjudication relied on by complainant herein was only as to 1893 taxes, and same is not conclusive in another litigation as to any other year's taxes, in Kentucky. That is the settled law in Kentucky as to the effect of former judgments in tax cases. (City of Newport vs. Commonwealth, 21 Ky. L. Rep., 42; Louisville Bridge Co. vs. City of Louisville, 22 Ky. L. Rep., 703, and authorities therein cited.) Such also is the law as to the effect of former judgment in tax cases in the states of Tennessee, Iowa, Michigan and other states. (Union and Planters Bank vs. Memphis, 46 S. W. R., 557; Davenport vs. Chicago & R. I. Ry., 38 Ia., 633; Lake Shore, &c., Ry. vs. People, 46 Mich., 208.)

In Keokuk & Western Ry. vs. Missouri, 152 U. S., 314, this Court said: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action." The same principle was reaffirmed in Nesbitt vs. Riverside Independent District, 144 U. S., 610. See also 146 U. S., 279 and 302. Whatever diversity of authority or difference of opinion there may be on the subject of *res judicata* in tax cases, generally, all the authorities agree that the courts of other States and of the United States will (if they are advised thereof) give the same effect to the judgments of a State Court as the courts of the State in which the judgments were rendered gave the same. This is in compliance with section 905, Revised Statutes of the United States. This principle was settled by this Court in Mills vs. Duryee, 7 Cranch, 484, and has been adhered to by this Court ever since. See 13 Peters, 324; 5 Wallace, 290; 18 Wallace, 457; 140 U. S., 264; 161 U. S., 384. The same principle was recognized and applied by this Court in New Orleans vs. Citizens Bank, 167 U. S., 385. Had the effect, as an estoppel, due such judgments in Kentucky been settled by the Kentucky Court of Appeals in 1899, when the Bank tax cases from Kentucky were decided by this Court, the same effect would have been given said judgments by this Court as are given them by the Courts of Kentucky—and, consequently, the plea of estoppel by the Banks in those cases would not have been sustained by this Court.

3rd. In the light of the decision of this Court in the case of Owensboro Nat. Bank vs. Owensboro, 173 U. S., 665, the alleged Hewitt bill contract was, from the beginning, illegal and void as to national banks. The same requires taxa-

tion of not only the stock of the bank but also the "surplus, undivided surplus, undivided profits, undivided accumulations" in excess of ten per cent. in value of the stock, makes the cashier and his sureties liable for same and also twenty per cent. penalty in the event of non-payment. (General Stats. Ky., page 1039.) According to said decision of this Court, the taxation of national banks as provided in said Hewitt bill, was unauthorized, illegal and void—and the attempt on the part of "a majority in the interest of a quorum" of the stockholders to bind the banks and the other stockholders to such taxation was clearly *ultra vires*, and beyond the power of the stockholders agreeing thereto. Hence, there could not have been any binding contract between the State and national banks by virtue of the Hewitt bill. The question here suggested (as to obligation of Hewitt bill upon national banks) was not considered nor determined by the court, nor suggested by any litigant or counsel in said former adjudication, and hence is not *res adjudicata* in any subsequent suit upon a different cause of action. (Cromwell vs. Sac., 94 U. S., 351.)

The proposition, that the Hewitt bill constituted a valid and irrevocable contract between national banks and the State, not being reconcilable with the said decision by this court in Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., the said adjudication by the Kentucky Court of Appeals, in 1895 (now relied on by appellee as an estoppel) operates as a "*judgment*" estoppel, upon the principle announced in Packet Co. vs. Sickles, 24 Howard, 333-341—that is, it prevents a relitigation of the same case. But it is not available in this case as a "*verdict*" estoppel, upon the principle enunciated in Cromwell vs. Sac, 94 U. S., 351.

This being a different case, and for different years' taxes, from that decided in 1895, the judgment of 1895 is available herein, if at all, only as a "verdict" estoppel. (Bigelow on Estoppel, 5th ed., pages 100 and 101.) It is not good as a "verdict" estoppel, because the issue now being tried—whether or not the Hewitt bill ever constituted a valid and irrevocable contract with national banks (That is, whether or not the same was constitutional as to national banks?)—was not *presented, considered*, nor *determined* in the said litigation of 1895.

THERE IS NO SUFFICIENT GROUND FOR THE EXERCISE OF EQUITABLE JURISDICTION HEREIN.

It appearing that the bank is not, in truth, protected by irrevocable contract, there is no equity in the bill. The bill does

not present a cause of action that is cognizable in equity. In support of the foregoing proposition, as to equitable jurisdiction, we need not cite any other authority than "Foster's Federal Practice," 2nd edition, vol. 1, sec. 12. The positionof the bank herein is precisely the same as if it were asking the Chancellor to aid in giving effect to a judgment upon a promissory note shown by its bill to have been paid and satisfied before rendition of the judgment thereon. It is so obviously fair, just and right, that taxation should be equally apportioned among the beneficiaries thereof, that the courts have uniformly held and now all hold: That, where any person claims immunity from equal taxation, he must establish the exemption beyond doubt. That principle applies with increased force to cases in which the claim of exemption is based solely upon a technical estoppel against the truth. Bigelow on Estoppel, 5th edition, page 706, says: "The estoppel by record is legal, and hence, to give a court of equity jurisdiction to entertain it, it would be necessary to show some equity apart from the estoppel." An additional reason against the equitable jurisdiction herein is, that the complainant's proper remedy is at law. By paying taxes claimed by the city of Covington, complainant could avert all the alleged injuries complained of in the bill, except the loss of the amount of money in controversy, and by a suit at law to recover same with interest and cost, the bank could recover the same if it be legally entitled thereto. The bill only purports to show a strictly legal right to the exemption from taxes. The bill shows that the city of Covington is in equity and good conscience entitled to the taxes claimed, but proposes to override and defeat that equity of the city by means of "a technical estoppel against the truth." The Statutes of Kentucky provide for the recovery of illegal taxes paid under protest or compulsion, making complainant's remedy at law complete and ample for the protection of all the bank's rights in controversy herein. (Covington vs. Powell, 2 Met., 231; Louisville vs. Henning, 1st Bush, 382; Louisville vs. Anderson, 79 Ky., 344.)

The foregoing does not contravene the jurisdiction exercised by Judge Taft in Bank of Ky. vs. Stone, &c., and other cases heard therewith, 88 Fed. Rep., 385–398.

The grounds upon which Judge Taft exercised equitable jurisdiction in said cases were (1) inadequacy of the remedy at law, and (2) the avoidance of a multiplicity of suits. (88 Fed. Rep., 390–392.) Neither of said grounds for the exercise of equitable jurisdiction exists in this case.

Appellants respectfully ask of this Honorable Court, that the judgment below be reversed, and that the appellants' right to enforce the payment of city taxes under said act of the Kentucky Legislature be upheld, or else, that the case be dismissed for want of equitable jurisdiction. We concede that the plea of estoppel is good as to taxes for the year 1893 (that involved in the 1895 litigation), though the court below did not think so.

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HARVEY MYERS and
W. H. JULIAN,
For Appellants.

AUTHORITIES.

CONSTITUTIONALITY OF THE ACT OF MARCH 21, 1900.

1st. Upon the subject generally, see:

Marion County vs. L. & N. R. R. Co., 91 Ky., 388;
Butler vs. City of Toledo, 5 Ohio St., 225; and
First National Bank vs. Commonwealth, 9 Wallace, 353.

2nd. As to liability of national bank shares to taxation from 1892 to 1900, see

Constitution Kentucky, sections 170, 171, 172 and 174;
Kentucky Statutes, sections 4020, 4022, and the charters of first, second, third, fourth, fifth and sixth classes, incorporated in Kentucky Statutes;
Scobee, Sheriff, vs. Bean, &c., 22 Ky. L. Rep., 1076.

3rd. As to city's lien, see:

Kentucky Statutes, sections 3375 and 3176;
Board of Councilmen vs. Mason & Foard Co., 100 Ky., 48;
Blackwell on Tax Titles, 5th ed. (1889), secs. 324 and 327.

4th. As to the proper situs for the taxation of such shares, see:

Revised Statutes, U. S., section 5219,
Kentucky Statutes, article 3, chapter 108; and section 171, State Constitution, which requires uniformity; also Maltby vs. R. & Col. Ry. Co., 52 Pa. St., 140.

5th. As to discrimination, see:

Paducah Street Ry. Co. vs. The County of McCracken, 20 Ky. L. Rep., 1294;
See also unbroken line of Supreme Court decisions, from Adams vs. Nashville, 95 U. S., 19–22, to First National Bank of Aberdeen vs. County of Chehalis, 166 U. S., 439–441.

6th. As to the whole case, see:

Scobee, Sheriff, vs. Bean, &c., decided by Kentucky Court of Appeals on December 14, 1900, 22 Ky. L. Rep., *1076*.

7th. As to burden of proof, and doubt in mind of the Court, see:

Sinking Fund Cases, 99 U. S., 700; and
Powell vs. Pennsylvania, 127 U. S., 684.

8th. As to retrospective assessments in Kentucky, see:

Kentucky Statutes, sections 4090 and 4241; also
Louisville and Jeffersonville Ferry Co. vs. Commonwealth, 22 Ky. L. Rep., 446.

AS TO THE PLEA OF ESTOPPEL HEREIN.

1st. The question of the Appellee's liability to the taxes in controversy is a different question from that involved in former adjudication.

Kentucky Acts of 1900, page 65;
City of Newport vs. Masonic Temple Association, 20 Ky. L. R., 266;
Citizens Savings Bank of Owensboro vs. City of Owensboro, 173 U. S.

2nd. The plea of estoppel herein would not be good in the courts of Kentucky—and, hence, is not good in this court:

City of Newport vs. Commonwealth, 21 Ky. L. R., 42;
Louisville Bridge Co vs. City of Louisville, 22 Ky. L. R., 703;
Also 46 S. W. R., 557; 38 Ia., 633; 46 Mich., 208;
Keokuk & Western Ry. Co. vs. Missouri, 152 U. S.; 144 U. S., 610; 146 U. S., 779 and 302.

The Federal Courts follow the State Courts on that subject:

Rev. Seats., U. S., section 905;
Mills vs. Duryee, 7 Cranch, 484;
13 Peters, 324; 5 Wallace, 290; 18 Wallace, 457; 140 U. S., 264.

3rd. The Hewitt Bill was unconstitutional as to national banks. This subject was not presented, considered nor determined in the said litigation of 1895, and is not res judicata in this case, except as to the taxes for 1893.

Cromwell vs. Sac, 94 U. S., 351;
Bigelow on Estoppel, 5th ed., pages 100 and 101.

THERE IS NO SUFFICIENT GROUND FOR THE EXERCISE OF EQUITABLE JURISDICTION HEREIN.

Foster's Federal Practice, 2d ed., vol. 1, sec. 12;
Bigelow on Estoppel, 5th ed., page 706;
Covington vs. Powell, 2d Met. (Ky.), 231;
Louisville vs. Henning, 1st Bush, 382;
Louisville vs. Anderson, 79 Ky., 344.

No. 255.

MAR 5 1902
JAMES H. McKENNEY, Clerk.

Supp'l Brf. of Hanlon, Myers & Julian for Appellants.

Filed March 5, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

CITY OF COVINGTON, ET AL. ..... Appellants,

vs. } In Equity.

FIRST NATIONAL BANK OF COVINGTON, KY. ..... Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

F. J. HANLON, City Solicitor,
HARVEY MYERS and
W. H. JULIAN,
For Appellants.

Standard Printing Co., Frankfort, Ky.

Supreme Court of the United States.

OCTOBER TERM, 1901.

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FIRST NATIONAL BANK OF COVINGTON, KY. ..... Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

AS TO THE PLEA OF ESTOPPEL HEREIN.

I.

APPELLEE ESTOPPED BY JUDGMENT BELOW.

There having been no appeal by the appellee from the judgment below herein, the appellee is estopped by the judgment below in so far as the same was adverse to the appellee. The court below, herein, expressly held (1), that the Hewitt bill never constituted an irrevocable contract, and (2), by necessary implication, also held that the plea of estoppel relied on by appellee was and is unavailable herein. Hence, the appellee is now *estopped* from claiming in this court that the Hewitt bill constituted an irrevocable contract, and is also estopped from now insisting in this court upon the plea of *res judicata* made and overruled in the court below.

The original bill of complaint by appellee was filed herein on July 23, 1900. The said bill set forth two, and only two, grounds for injunction, namely—1st, the proposition of contract under the Hewitt bill, and 2d, the proposition of estoppel by a former judgment. The

appellee prayed judgment of the lower court as to each, and both, of said two propositions—and prayed that the city of Covington and its officers be enjoined from violating the bank's said alleged contract "*during the corporate existence*" of the bank—in other words, until November 17, 1904. (Record, page 13.)

On the same day that said original bill was filed (July 23, 1900), appellee entered a motion for injunction and notice was executed upon said city and its assessor, that the appellee (complainant) would, "on the 31st day of July, 1900, at 12:15 p. m., in chambers, at the Federal Court building, in the city of Louisville, Kentucky, apply to the Honorable Walter Evans, Judge of the United States Circuit Court for the District of Kentucky, for a temporary injunction, in accordance with the prayer of the bill of complaint herein." (Record, pages 28 and 29.)

What was done in chambers at Louisville on said July 31, 1900 (if anything), the record does not show. However, the record does show that no injunction or restraining order was issued on that day, or at any time *upon said original bill of complaint.*

The record also shows that, fourteen days after the said July 31, 1900, on August 14, 1900, the appellee filed an "amended bill of complaint," alleging that the act of March 21, 1900, was in conflict with section 5219 of the Revised Statutes of the United States, and that the said act was null and void.

The said amended bill also declares that the said act conflicts with the Constitution of the United States in divers other respects. (Record, page 30.)

On the same day that said amended bill was filed, August 14, 1900, the temporary injunction herein was granted by the court below. (Record, page 58.)

It is plain, therefore, that the injunction was granted upon the said allegations of the amended bill, and that

the original bill was regarded by the court below as insufficient to authorize *any* injunction.

The said temporary injunction granted was not the temporary injunction sought by the appellee and prayed for in the bill of complaint. It did not recognize the existence of the said proposition of contract, nor did it recognize the soundness of the said proposition of estoppel by former judgment. On the contrary, the order of injunction was diametrically inconsistent with each and with both of said propositions. It expressly permitted the assessment of the shares of stock for taxation under the levies of 1900 and subsequent years, thus refusing and rejecting the appellee's claim to exemption under the Hewitt law during its corporate existence, which does not terminate until November the 17th, 1904.

Said temporary injunction was perpetuated on Dec. 17th, 1900, upon the grounds stated in the opinion of the court below.

That opinion expressly declares that the former judgment holding that the Hewitt bill constituted an irrevocable contract was "*palpably erroneous.*" Among other things, the said opinion declares as follows:

> "Within a year or so after this judgment was rendered, and from which no appeal could be taken to the Supreme Court of the United States for the reason already indicated, the Court of Appeals overruled the doctrine which it had therein announced, and expressly held that there was no contract growing out of the facts adjudicated in the previous litigation. (39 S. W. Rep., 1030.)
>
> "It was there also held that legislation as to the manner of imposing taxation could not be made the basis of a contract, but was a matter entirely under the control of the State and might be altered at its pleasure. In the case of The Citizens Savings Bank, &c., vs. Owensboro, 173 U. S., 636, the Supreme Court sustained in the fullest manner the last view taken of the question by the Court of Appeals of Kentucky; so

> that we have here the claim to the benefit of the doctrine of *res judicata* as against the clearest decision that the judgment relied on was based upon a proposition, not of fact but of constitutional law, *which has been utterly repudiated, not only by the highest judicial tribunal in Kentucky which announced it, but also by the Supreme Court of the United States itself.*" (Record, page 56.)

Hence, we did not misrepresent the opinion or the judgment of the court below when we stated in the beginning of this paragraph that "the court below, herein, expressly held (1), that the Hewitt bill never constituted an irrevocable contract, and (2), by necessary implication, also held that the plea of estoppel relied on by appellee was and is unavailable herein."

The appellee bank excepted to said judgment below; but took no appeal therefrom. A judgment can only be reversed, on appeal, for error *to the prejudice of the appellant*. Therefore, the judgment below as to the appellee's propositions of "*contract*" and "*estoppel*" stands a final judgment in those respects, and operates as a complete *estoppel* against the appellee, in so far as its claim herein to contract rights or to protection by estoppel are concerned.

The appellee asked and obtained the opinion and judgment of the court below as to those questions and is concluded thereby in the trial of this appeal. Each of said two issues was distinctly presented by the pleadings and determined by the court below adversely to the appellee bank. The court below, having expressly determined that the Hewitt bill never constituted an irrevocable contract, the perpetuation of the injunction granted permitting assessments for 1900 and subsequent years (anterior to Nov. 17th, 1904) necessarily involved said question of estoppel and a determination thereof adversely to the appellee bank.

The case of "The Chattahoochee," 173 U. S., 540, was argued in this court on May 3 and 4, 1898, and reargued on March 6, 1899. Same was decided April 3, 1899. The opinion was delivered by Mr. Justice Brown. In statement of the case, this court said:

> "This was a libel for a collision which took place in the early morning of July 20, 1894, southeast of Nantucket Sholes, between the Canadian schooner Golden Rule and the American steamship Chattahoochee, resulting in the total loss of the schooner and her cargo. * * * The district court was of opinion that both vessels were in fault for immoderate speed, and that the damages should be divided.
>
> " * * * Upon appeal to the Circuit Court of Appeals, that court affirmed the decree of the district court; but modified the same with reference to the distribution between the owners and master of the Golden Rule on the one side and her mate and crew on the other. * * (33 U. S. App., 510.)
>
> "Whereupon an application was made to this court by the libelants for a writ of certiorari, which was granted."

Mr. Justice Brown, delivering the opinion of this court, on appeal by owners of the Golden Rule and her cargo (libelants), said:

> "There can be no doubt whatever of the liability of the steamer, and *as she did not appeal, of course she is estopped to deny such liability in this court.*"

It is familiar law, that "*an estoppel against an estoppel sets the matter at large.*" (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

II.

CHARACTER OF ESTOPPEL PROPOSED BY APPELLEE.

What was proposed by the appellee in the court below as an estoppel?

It was a judgment of the Campbell Circuit Court (Ky.), rendered on Jan. 31, 1894, simply enjoining the city and its officers from attempting to collect any part of $14,892.43, city taxes for the year 1893—which judgment was affirmed by the Court of Appeals on December 2, 1895. (Record, page 26.)

The suit for said injunction was to restrain the city and officers from collecting said amount of taxes upon the *franchise* of the bank under the revenue act of 1892. The appellee bank, in that suit, expressly alleged that its "franchise" was not subject to taxation by the city of Covington. "Plaintiff says that its franchise is not subject to taxation by defendant." (Record, page 20.)

The opinion of the Campbell Circuit Court in said suit, after arguing the question of the Hewitt bill contract without announcing the court's conclusion as to that question, concludes as follows:

> "Another reason why this tax cannot be collected of these plaintiffs is that *they are national banks.*
>
> "This is not a tax on the shares of their capital stock; it is a tax on their franchises.
>
> "National banks are the instrumentalities of the federal government to provide a national currency.
>
> "To allow the State to tax their franchises is to permit the States to destroy this agency of the federal government to accomplish the purposes of that government.
>
> "McCullock vs. State of Maryland, 4 Wheat., 317; Osburne vs. United States, 9 Wheat., 739.
>
> "For these reasons the demurrer will be overruled." (Record, page 25.)

Of course, therefore, neither the said judgment of the Campbell Circuit Court, nor the affirmance thereof by the Court of Appeals, nor the opinion of the Campbell Circuit Court, nor all of them combined, constitute an estoppel in this case.

The opinion of the Court of Appeals, rendered at the time of the affirmance of said judgment, is not entirely clear in its application to *national banks.*

It related principally to the case of *State banks*, and proceeded very largely upon the idea, that the State banks being taxable only under the Hewitt law, the national banks could not be taxed under the revenue act of 1892, without violating the Constitution and laws of the United States.

Said opinion cites City National Bank of Paducah vs. The City of Paducah, 10 Ky. L. R., 221, and Covington City National Bank vs. City of Covington, 21 Fed. Rep., 484, undertakes to avoid the force of the decision of this court in Lionberger vs. Rouse, 9 Wallace, 468, and plainly *assumes* that national banks must be taxed as the State banks generally are taxed. Said opinion also *assumed* that the legislature of 1886 possessed the power to enter into the Hewitt bill contract with national banks. The power of the Legislature in that regard was not considered nor determined. The opinion was confined entirely to the subject of the proper *construction* of the Hewitt law. Besides, it was not *material* to the rights of the appellee bank, in that litigation, what the proper construction of said law was. Being a national bank, its franchises were not subject to taxation under the revenue law of 1892. The said judgment of the Campbell Circuit Court was proper. The said affirmance thereof by the Court of Appeals was proper.

It was entirely unnecessary to the said affirmance or to a proper adjudication of the rights of the appellee bank, in that litigation, for the court to construe the Hewitt law. Hence, the said opinion (in so far as it related to the appellee) was, at most, only an *unnecessary erroneous* expression of opinion as to an *immaterial* matter, which had been improperly brought into the case.

There are two reasons why said construction was not material to the rights of either party to said litigation:

1st—The franchises of national banks were not taxable under the act of 1892, *regardless of said construction;* and, 2d—there was no power in the legislature and a majority in interest of the stockholders of national banks to bind the banks and their stockholders by such a contract, *regardless of said construction.*

Where a judgment is affirmed or reversed on appeal, and the judgment affirming or reversing is supported by an opinion written by a single member of the court, the opinion is not binding as the judgment of the court except in so far as it is *necessary* to the affirmance or reversal or is expressly concurred in by a majority of the court.

In said litigation the opinion was written by Judge Pryor. Three of the seven members of the Court of Appeals (Judges Lewis, Paynter and Guffy) expressly dissented therefrom. Three of the judges (Judges Eastin, Hazelrigg and Grace) tacitly acquiesced in the affirmance.

Judges Eastin, Hazelrigg and Grace, seeing that the judgment of the Campbell Circuit Court should be affirmed as to the appellee herein (First National Bank of Covington) upon the grounds stated in the opinion of said Campbell Circuit Court, tacitly acquiesced in the affirmance while they may have been undecided as to the contract question involved, in its application to national banks.

As to the state banks involved in said litigation, the case was radically different from that of the national banks. As to the state banks, a construction of the Hewitt bill was *necessary*, in each case, to an affirmance or reversal.

CERTAINTY is of the very *essence* of estoppel. If there be any uncertainty or doubt as to the application of the doctrine of estoppel to the case being tried, *there is no estoppel.* (Bigelow on Estoppel, 5th Ed., pages 61, 366, 578, and authorities there cited.)

However, and independently of the foregoing, since the said opinion by Judge Pryor, it having been deter-

mined and settled that the Hewitt law never was an irrevocable contract and was repealed by the revenue act of 1892, the legislature of 1900, on March 21, 1900, expressly subjected the shares of stock in the appellee bank to the proposed taxation. That it was within the power of the legislature of 1900 to do so, is unquestionable. The legislature did not thereby impair the obligation of any contract. It did not thereby divest the appellee of any right to which it was in truth and justice entitled. It may have thereby limited the effect of the said opinion as a technical estoppel. But the effect that should be given a judgment of a State court as an estoppel is a matter entirely within the discretion of the legislature of the state in which the judgment is rendered.

The effect of state court judgments is governed by "the courts, laws and usages" of the state in which they are rendered." (Rev. Stats. U. S., sec. 905; Phoenix Ins. Co. vs. Tennessee, 161 U. S., 185.)

That the Court of Appeals of Kentucky may (within the limits of the statute law of Kentucky) determine the effect as an estoppel that should be given said opinion of 1885, will not be questioned. *A fortiori*, the power of the legislature of 1900 to adopt said act and thus destroy the effect of said opinion as an estoppel herein, must be conceded. All that the legislature of 1900 possessed the power to do, in that regard, was done by the adoption of said act. The language and expressed object of the act show plainly, that the legislature intended thereby to place all national banks, without any exception, upon the same footing with each other and with the state banks in respect to taxation, in so far as it was within the power of the legislature to do so.

This court will take judicial notice of the fact that said legislature of 1900 repealed the charters of all the state banks of Kentucky which claimed exemption from taxation by virtue of the said erroneous adjudication of 1895. (Acts, 1900, Ky., —, page 88.)

Where events transpire after a judgment, affecting the rights in controversy in the former suit, the judgment does not operate as an estoppel in a subsequent suit founded on a different cause of action from that of the former suit. (Freeman on Judgments, 4th ed., sec. 329, and authorities there cited.)

Lastly, in respect to the subject of this paragraph, it is essential to the estoppel by "former verdict," not only that the issue in the subsequent suit be identical with that in the former suit, but also that the *circumstances* of the two suits must be the same.

In New Orleans vs. Citizens Bank, 167 U. S., Justice White emphasized that principle—that the issue in the two suits must be identical, and must arise under the "*same circumstances and conditions*" in the second as in the former action.

It will not be seriously contended that the circumstances of this controversy are the same as those under which the said opinion by Judge Pryor was rendered. Under the circumstances of this case, Judge Pryor's opinion of 1895 would have been directly the reverse from what it was.

It is also a fundamental principle of the estoppel by "former verdict," that a judgment in a former suit does not preclude the parties, in a subsequent suit on a different cause of action, from bringing forward grounds of recovery or defense which were not actually brought forward and determined in the former suit. (Cromwell vs. Sac., 94 U. S., 351; and Gould vs. Evansville, &c., R. R. Co., 91 U. S., 534.)

In this case, the appellants rely upon several grounds of defense that were not considered nor determined in the said former litigation, namely:

1st. That the Hewitt law contract, in its application to national banks, was in violation of sec. 5219 of Rev. Stats. U. S.)

2nd. That it has now been settled by repeated adjudications that said law was not irrevocable and was repealed in 1892—a defense that would have defeated the former suit and prevented the judgment now relied on by appellee as an estoppel.

3rd. The act of March 21, 1900, before referred to.

Hence, the plea of estoppel by appellee was properly overruled by the court below.

III.

THE ESTOPPEL PROPOSED BY APPELLEE SHOULD NOT PREVAIL IN THIS COURT, BECAUSE THE SAME WOULD NOT PREVAIL IN THE COURTS OF KENTUCKY.

What effect as an estoppel should be given the judgment relied on by appellee herein?

In the case of Mills vs. Duryee, 7 Cranch, 484, this court, having under consideration the question above propounded, after discussing the constitutional provision and act of Congress on the subject, Justice Story delivering the opinion, said:

> "It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered, * * * and we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."

In the case of Hampton vs. McConnel, 3 Wheaton, 234, this court, Chief Justice Marshall delivering opinion of the court, said:

> "This is precisely the same case as that of Mills vs. Duryee. The court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States,

which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

To the same effect is McElmoyle vs. Cohen, 13 Peters, 326; Christmas vs. Russell, 5 Wallace, 290; Thompson vs. Whitman, 18 Wallace, 457; Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184.

Besides, the same being a non-federal question, in which only citizens of Kentucky are concerned, this court will, for that reason alone, follow the state court decisions on that subject. (Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184; Abraham vs. Casey, 179 U. S., 218.)

We have, therefore, only to ascertain the effect as an estoppel given to such judgments, as that relied on by appellee herein, "by the courts, laws and usuage" of Kentucky. Would the same be a good plea of estoppel in the courts of Kentucky?

In the case of City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 47 (decided April 26, 1899), the Kentucky Court of Appeals said:

> "The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. * * * * *
>
> "The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed in invitum. The tax-payer does not agree to pay but is forced to

pay, and *the right to litigate the legality of a tax* UPON ALL GROUNDS *must of necessity exist, regardless of former adjudications as to the validity of a different tax.* * * *

"The decision of the circuit court as to the taxes for 1893 is not binding upon this court as to the taxes for subsequent years."

"It follows, therefore, that the judgment must be affirmed.

"The whole court sitting."

It matters not, therefore, *upon what ground* the exemption is claimed in the former suit—whether that of contract, or that the property is used for governmental purposes, or that it is exempted by statute, or that the exemption claimed is a vested or constitutional right—whatever the ground of exemption relied on and litigated in the former suit as to one year's taxes, the adjudication (according to the foregoing decision), is not conclusive as to the same matters of fact or law in a subsequent litigation between the same parties as to any other year's taxes.

The above doctrine, announced by the Kentucky Court of Appeals in 1899, in the foregoing case, has been uniformly adhered to by that court ever since, and has been reasserted by the same court in numerous cases between the date of said decision and the present time.

The next Kentucky case involving the same question was that of the Louisville Bridge Co. vs. The City of Louisville, 22 Ky. L. Rep., 703 (decided Oct. 17, 1900)—in which the Court of Appeals said:

"In response to appellant's plea of *res judicata*, it may be said that this identical question was before the court in the case of the Henderson Bridge Co. vs. The City of Henderson, decided June 24, 1896, and in the very recent cases of Newport vs. Masonic Temple Co., 20 Ky. L. Rep., 266, and The City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42. It was held

that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year, and as the question is fully considered in these cases it is unnecessary to elaborate it again."

On the same subject, in the case of Negley, Sheriff, vs. City of Henderson, 59 S. W., 19 (decided Nov. 21, 1900), a Kentucky case, the Court of Appeals said:

> "This brings us to consider the question of *res judicata*. It was, in City of Newport vs. Commonwealth, *supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the same tax for another year."

The next case to same effect, in Kentucky, was that of Bell County Coke and Improvement Co. vs. The City of Pineville, 23 Ky. L. Rep., 933 (decided October 4, 1901). The substance of the decision is stated in the syllabus as follows:

> "A judgment enjoining the collection of a tax for one year does not prevent the collection of a tax for another year."

The opinion, after stating the case and coming to the plea of *res judicata*, said:

> "The case of the City of Newport, &c. vs. Commonwealth, 21 Ky. Law Rep., 42, is decisive of the question raised by the plea of *res judicata*."

The case of the Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort, 23 Ky. Law Rep., 1285 (decided on Nov. 19th, 1901), involved the same question. Exemption was claimed by the bank on the ground of a former adjudication of contract in a litigation as to taxes for the years 1895, '6, '7 and '8. The court, holding the plea of estoppel to be unavailable, said:

"It is not necessary for this court to hold, and it does not (the question not being before it), that the bank is responsible for the taxes for the years involved in the federal court proceeding. However, we do hold that the judgment of the federal court is not a bar to a recovery of the taxes for the years 1893 and 1894.

"This court, in City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42; Louisville Bridge Co. vs. City of Louisville, 22 Ky. Law Rep., 703, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

The last-named case was followed, on Dec. 19th, 1901, by the case of Lou. Bridge Co. vs. City of Louisville, 65 S. W. R., 814. The plea of estoppel by *res judicata* was interposed as a ground of exemption. But the Court of Appeals (Ky.) said: "The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for us to consider this question: It having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes for one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's taxes"—(the court here citing with approval the Kentucky cases on that subject above referred to in this brief.)

In the case of Douglas vs. Commonwealth, 15 Ky. L. Rep., 581, the Court of Appeals held the same character of judgment, as that now relied on by appellee, to be no estoppel *solely upon the ground that the former judgment was erroneous and had been overruled.*

The court, on that subject, said:

"It is contended that the subject of the appellee's right is *res judicata* in this court. It is sufficient to say that the state had no constitutional right to contract its police power away, consequently the appellee made his purchase of the franchise subject to the right

of the State to repeal it; and the decisions of this court that the appellee's purchase of the franchise by the authority of the legislature created a contract that could not, under the Federal Constitution, be revoked, having been virtually overruled by the Supreme Court of the United States (the fact that the said decisions by this court have been overruled), destroys the contention of the *res judicata*."

The opinion last cited was affirmed by this court, in Douglas vs. Kentucky, 168 U. S., 488.

There can be no doubt, therefore, what effect as an estoppel the Kentucky Court of Appeals would give the judgment relied on herein by the appellee as an estoppel, if this case were pending in that court.

Viewed in the light of the Kentucky decisions alone, the same is not an estoppel in this case.

Hence, under the now well established principle first announced in Mills vs. Duryee, 7 Cranch, and adhered to by this court ever since, the plea of estoppel by appellee is not available herein.

We submit that the plea of estoppel by appellee should not prevail in this case.

F. J. Hanlon, City Solicitor,
Harvey Myers and
W. H. Julian, *W. H. McClain*,
For Appellants.

AUTHORITIES.

I.

APPELLEE ESTOPPED BY JUDGMENT BELOW.

The case of "The Chattahoochee," 173 U. S., 540; Bigelow on Estoppel, 5th ed., page 360, and authorities there cited.

II.

CHARACTER OF ESTOPPEL PROPOSED BY APPELLEE.

(1). Certainty is of the very essence of estoppel. Bigelow on Estoppel, 5th ed., pages 61, 366, 578, and authorities there cited.

(2). Subsequent events prevent estoppel by former judgment. (Freeman on Judgments, 4th ed., sec. 329, and authorities there cited.)

(3). The issue in the two suits must be identical, and must arise under "the same circumstances and conditions" in the second as in the former suit. (New Orleans vs. Citizens Bank, 167 U. S., 371.)

(4). Former judgment does not estop as to grounds not actually determined in former suit. (Cromwell vs. Sac., 94 U. S., 351; Gould vs. Evansville, &c., R. R. Co., 91 U. S., 534.)

[OVER]

III.

THE ESTOPPEL PROPOSED BY APPELLEE SHOULD NOT PREVAIL IN THIS COURT, BECAUSE THE SAME WOULD NOT PREVAIL IN THE COURTS OF KENTUCKY.

(1). Mills vs. Duryee, 7 Cranch, 484.
Hampton vs. McConnel, 3 Wheaton, 234.
McElmoyle vs. Cohen, 13 Peters, 326.
Christmas vs. Russell, 5 Wallace, 290.
Thompson vs. Whitman, 18 Wallace, 457.
Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184.
Abraham vs. Casey, 179 U. S., 218.

(2. Kentucky cases).

City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 47 (decided April 26, 1899).

Louisville Bridge Co. vs. City of Louisville, 22 Ky. Law Rep. (decided Oct. 17, 1900).

Negley, Sheriff, vs. City of Henderson, 59 S. W., 19 (decided Nov. 21, 1900).

Bell County Coke and Improvement Co. vs. City of Pineville, 23 Ky. L. Rep., 933 (decided Oct. 4, 1901).

Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort, 23 Ky. Law Rep., 1285 (decided Nov. 19th, 1901).

Louisville Bridge Co. vs. City of Louisville, 65 S. W., 814 (decided on Dec. 19, 1901.)

See also the case of Douglas vs. Commonwealth, 15 Ky. L. Rep., 581, which was affirmed by Supreme Court, 168 U. S., 488.

Counsel for appellants omitted, in preceding briefs, to direct attention of the court to the two following cases:

Bohannon, Sheriff, vs. Bank of Shelbyville, 23 Ky. L. Rep., 508, and

Bank of Commerce of Louisville vs. Stone, Auditor, 22 Ky. L. Rep., 70.

The above two cases, in themselves, is a sufficient response to so much of appellee's brief herein as relates to payments improperly made by the appellee bank to persons acting as Auditors of the State, under the Hewitt law after the same had been repealed.